EWE KHAY GUAN v. CHIN OI KHIUN

HIGH COURT MALAYA, PULAU PINANG
AZIZAN MD ARSHAD JC
[DIVORCE PETITION NO: PA-33-114-03-2021]
24 JULY 2023

Abstract – *It is the court's discretion to allow an application for discovery of documents under O. 24 r. 13 of the Rules of Court 2012 when it is satisfied that the documents sought are relevant, necessary and not a fishing expedition.*

CIVIL PROCEDURE: *Discovery – Documents – Application for – Determination of financial capacity – Whether documents relevant to issues contained in divorce petition –Whether fishing expedition – Whether documents necessary and could save parties' costs – Whether requirements under O. 24 of Rules of Court 2012 fulfilled – Whether application ought to be allowed – Evidence Act 1950, s. 3*

FAMILY LAW: *Divorce – Proceedings – Application for discovery of documents – Determination of financial capacity – Whether documents relevant to issues contained in divorce petition – Whether fishing expedition – Whether documents necessary and could save parties' costs – Whether requirements under O. 24 of Rules of Court 2012 fulfilled – Whether application ought to be allowed – Evidence Act 1950, s. 3*

The petitioner/appellant ('PH') and the respondent ('RW') were legally married on 23 September 1976. Since 29 July 2016, the PH and the RW had been living separately arising from the PH's unilateral decision to exit the marriage. The matter in dispute to this petition was related to, among others, bank accounts, properties, assets, insurance policies and a company during the existence of the marriage. In the RW's application ('NOA'), the RW had particularised the documents which the RW intended to be disclosed under her application. Briefly, the documents varied as follows (i) the PH's bank statements; (ii) proofs of ownership of the PH's assets and/or property; and (iii) the PH's will; and travel records (collectively referred as 'discovery documents'). On the present facts, the bank statements, salary slips, insurance policies, proofs of ownership of properties and assets would avail the court and the RW for a proper examination of the PH's authentic financial capacity, which were (i) a material statement averred in the divorce petition in relation to the PH's financial standing; and (ii) how the PH was able to have control over the properties and assets during the marriage and/or its breakdown. The discovery documents sought by the RW were all records and documents which were well within the scope of s. 3 of the Evidence Act 1950 that would fall within the definition of 'document'. The RW submitted that the discovery documents were relevant to determine the issues in dispute before this court. The PH opposed the RW's application and

A contended four primary grounds of objection, namely (i) the discovery documents requested were not relevant to the issues contained in the divorce petition; (ii) that the RW was not claiming for any maintenance or share of the PH's property; (iii) the RH did not deny that the marriage had broken down; and (iv) the discovery documents were merely a fishing expedition
B that were not relevant based on the pleadings filed.

Held (allowing application for discovery):

(1) The documents sought were relevant in determining the PH's matrimonial assets, income and how they were obtained. This was not
C a 'fishing expedition.' All the relevant documents were specified by the RW. All the requested documents were stated clearly and not in a general way that confused the PH to supply them. PH did not deny the existence of the documents or deny it was in his possession. This showed that the requested documents existed and was under PH's control. The RW had successfully identified which discovery documents that the RW
D was seeking from the PH. The bank accounts were specific as to the bank account numbers; their bank source and the date of statements; the proofs of ownership of the PH's properties and assets (*eg*, vehicles, houses and insurance policies) had been identified down to the vehicle numbers, house addresses and the specific insurance policy numbers;
E and the PH's will and travel records had been identified on their specific timeline of such will and travel records. (paras 49 & 53)

(2) The PH's refusal to grant the RW the documents requested was based on grounds that were not relevant. Given that the copies of the documents sought concerned only the RW, were directly relevant to this
F case, and were undeniably in the PH's possession, custody or power. Therefore, there were no good reasons for the PH to refuse to give all the relevant documents in the first place. All the requested documents were documents that had actually been referred to by both parties in their respective pleadings, so it was relevant because it was not the
G documents that were cited for its existence in the application alone, but rather from the start of the filing of their respective pleadings. The documents were actually relevant not only to the RW's case but also to PH to refer to during the trial. The PH had a duty to disclose the relevant documents as listed in the application. Since the divorce petition
H involved a claim on 'during the marriage', of course documents related to the capacity of both parties were required. The use of credit cards, bank statements, for example, would certainly be able to assess the PH's financial ability in assessing the ability to contribute to marital property. The ownership document of immovable property would be able to
I determine who the owner was and how it was acquired and whether it was acquired in a marriage that made it matrimonial property. (paras 55-57)

(3) The argument that income related documents, credit cards and bank statements were irrelevant because the RW was not claiming maintenance in this case was inaccurate. This was because the documents were not only for maintenance purposes but also for divorce petitions where the financial capacity of the parties became an issue. Based on the financial capacity, it could be assessed whether the RW or the PH was in a comfortable financial position to claim that the properties mentioned were purchased or also involved financial contributions from both of them. Since this dispute involved documents, it was imperative that relevant documents be produced. The requested documents were related to the pleadings and relevant to the claims. The application by the RW had merit as it fulfilled the requirements under O. 24 of the Rules of Court 2012 ('ROC'). (paras 60-63)

(4) This court was satisfied that based on the facts of the case and also the pleadings of the divorce petition, the bank statements, salary slips, insurance policies, proofs of ownership of properties and assets would avail the court and the RW for a proper examination of the PH's financial capacity which were, *inter alia*, a material statement averred in the divorce petition in relation to the PH's financial standing and how the PH was able to have control over the properties and assets during the marriage and/or its breakdown. The documents were not only relevant but also necessary and saved the parties' costs. It was the court's discretion to allow this application as stated under O. 24 r. 13 of the ROC for the production and inspection of any documents. The RW had met the conditions set on the balance of probabilities in the well-established principles that had guided this court for this application to be allowed. (paras 64-69)

Case(s) referred to:

Bandar Utama Development Sdn Bhd & Anor v. Bandar Utama 1 JMB [2019] 10 CLJ 516 CA ***(refd)***

Billion Prima Sdn Bhd & Anor v. Nutech Company Ltd & Anor [2017] 1 CLJ 179 HC ***(refd)***

Datuk Amar James Wong Kim Min & Anor v. Pendaftar Pertubuhan [2004] 1 LNS 2011 HC ***(refd)***

Faber Merlin Malaysia Bhd v. Ban Guan Sdn Bhd [1980] 1 LNS 189 FC ***(refd)***

Kuah Kok Kim & Ors v. Ernst & Young (A Firm) [1997] 1 SLR 169 ***(refd)***

Malaysia Debt Ventures Berhad v. Platinum Techsolve Sdn Bhd & Ors [2020] 1 LNS 1252 CA ***(refd)***

Nguang Chan Aka Nguang Chan Liquor Trader & Ors v. Hai-O Enterprise Bhd & Ors [2009] 5 MLJ 40 ***(refd)***

Protasco Bhd v. Tey Por Yee & Anor And Other Appeals [2021] 9 CLJ 349 FC ***(refd)***

Thyssen Hunneback Singapore Pte Ltd v. TTJ Civil Engineering Pte Ltd P [2003] 1 SLR 75 ***(refd)***

Vikkaram Subramaniam v. Yogeswery Sarkgunalingam [2018] 1 LNS 39 HC ***(refd)***

Yap Yen Piow v. Hee Wee Eng [2016] 1 LNS 1060 CA ***(refd)***

Yekambaran Marimuthu v. Malayawata Steel Berhad [1994] 2 CLJ 581 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 3
Rules of Court 2012, O. 24 rr. 8, 10, 13, O. 92 r. 4

For the petitioner - M/s S Param & G Thila
For the respondent - M/s Choo Dee Wei

Reported by Suhainah Wahiduddin

JUDGMENT

Azizan Md Arshad JC:

Introduction

[1] This is an appeal against the decision of this court in allowing an application (encl. 15) by Chin Oi Khiun ("RW/respondent") with no order as to costs for the discovery of documents, pursuant to O. 24 and/or O. 92 r. 4 of the Rules of Court 2012 ("ROC 2012") ("discovery application").

[2] The hearing was heard on 11 May 2023 and the decision was delivered on 20 June 2023 and the petitioner ("PH/appellant") was not satisfied and appealed to the Court of Appeal for the decision. The parties are referred to as they were in the High Court.

The Application

[3] In this application ("NOA"), the RW applies for the following order:

> (1) The petitioner shall within seven days from the date of this order, provide a disclosure of documents in accordance with O. 24 r. 3 of the Rules of Court 2012 and/or O. 92 r. 4 of the Rules of Court 2012 by making and delivering to the respondent a list of the documents relevant to the matters at issue in this action, which are or have been in his possession, custody or authority together with an affidavit verifying the list;
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> (2) The petitioner shall make and file a further affidavit in accordance with O. 24 r. 7 of the Rules of Court 2012 within seven days from the date of this order, stating whether he has or had at any time been in possession, custody or his control, of the documents described in the sub-paragraphs below, and/or copies thereof, and if any document once existed but is now no longer in his possession, custody, or control, to state when he was separated from it and what has happened with the said documents:
>
> (2.1) Copies of bank statements from 2016 until present date in the accounts as follows:
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> (a) Public Bank Current Account No.: 313 7022 527;
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> (b) Maybank Account No.: 1070 9637 8338;
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> (c) Maybank Account No.: 5070 9566 6848;
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> (d) Maybank Account No.: 1073 5808 1288;

(e) UOB Account No.: 3363 6000 547;

(f) UOB Account No.: 1683 023 014;

(g) Hong Leong Account No.: 200 200 205 726; and

(h) CIMB Account No.: 70-6350949-7,

(2.2) Copies of credit card statements from 2016 until present date in the credit card accounts as follows:

(a) UOB Account No.: 4141-7000-0149-6477;

(b) UOB Account No.: 5222-2200-0078-6991;

(c) UOB Account No.: 5222-2200-0064-1022;

(d) Citibank Account No.: 4259-5850-0081-6553;

(e) Citibank Account No.: 4563-7730-0719-3652;

(f) Citibank Account No.: 4563-7730-0630-6925;

(g) CIMB Account No.: 4512-9500-0038-7273; and

(h) CIMB Account No.: 5417-2611-0001 -0010.

(2.3) A copy of the statement from 2016 until present date in the fixed deposit account as follows:

(a) Fixed Deposits Account in Standard Chartered Account No.: 730-3-5663259-2.

(2.4) A copy of the statements from 2016 until present date in the stock trading account as follows:

(a) UOB Kay Hian Securities CDS No: 078-002-043285014; and

(b) AA Anthony Securities CDS No: 078-003-043285014.

(2.5) A copy of the statement from loan account:

(a) CIMB for property No. 18, Lorong Lobak 5, Taman Serumpun, Berapit, 14000 Bukit Mertajam.

(2.6) The petitioner's financial statements held in ASB, LHDN and EPF from September 2016 until present date, including:

(a) EPF Membership No.: 5595649 (from September 2012 and not September 2015);

(b) IRB Income Tax No.: OG02491164100;

(c) petitioner's Standard Deposit/Consultant Doctor Retention Fee according to his employment at KPJ Bandar Perda Hospital;

(d) petitioner's payslips comprising payments of his salary and fees for his directorship in KPJ Bandar Perda Hospital; and

(e) petitioner's full and complete employment agreements with the said KPJ Bandar Perda Hospital from 2016 until present date.

A (2.7) Proof of ownership of assets and/or property ("Property") of the following:

(a) Grant and/or property title for No. 18, Lorong Lobak 5, Taman Serumpun, Berapit, 14000 Bukit Mertajam di bawah GRN 122232 Lot 377 Seksyen 3, Tempat Seberang Perai Tengah, Bandar Bukit
B Mertajam, Negeri Pulau Pinang;

(b) Grant and/or title for Property at 9A-20-13A, Taman Kheng Tian, Jalan Van Praagh, 11600 Georgetown, Pulau Pinang di bawah GRN 825313, Not Lot 2922 Seksyen 2 Daerah Timor Laut, Bandar Jelutong;

C (c) The rental agreement executed by the Petitioner in relation to the Property; and

(d) Receipt of rental income for the Property.

(2.8) In relation to the Petitioner's company which is ENT Medic Excel Sdn. Bhd. [Registration No: 201001020529 (904299-H)] ("Company"):

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(a) Valuation report of the shares held by the Petitioner in the said Company; and

(b) Records showing that the respondent works in the Company, particularly the payments and contributions made to the respondent including but not limited to pay slips and/or proofs of payment
E effected to the respondent.

(2.9) Ownership relating to the following vehicles held by the Petitioner, including ownership certificates and the respective ownership history (from 2012 to 2022):

F (a) BMW type car with Plate No. PKU 6652;

(b) Subaru type car with Plate No. BNV 6101;

(c) Lexus type car with Plate No. PQE 1979; and

(d) Honda type car with Plate No. PLH 9989.

G (2.10) Petitioner's ownership of all insurance policies whether owned by the Petitioner or where the Petitioner is the beneficiary of any such policy including but not limited to:

(a) AIA Insurance

(i) W752464059;

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(ii) W752618928;

(iii) 2013-P0066818-PSV-R004; and

(iv) 2016-P0066818-PSV-R007

(b) Allianz Insurance

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(i) 010 349 3467

(c) Prudential Insurance

(i) 169 589 85

(2.11) A current and valid will executed by the Petitioner; and

(2.12) The Petitioner's travel records from 2016 to present date, particularly his passport, regardless of the validity of the passport.

(3) If the documents described in paragraph (2) and the sub- paragraphs above and/or copies thereof are in the possession, custody or control of the Petitioner, the Petitioner shall within seven (7) days from the date of this order, disclose them to the Court in accordance with this order, and simultaneously delivering the said copies to the respondent for the respondent's inspection and storage;

(4) The cost of this application is paid and borne by the Petitioner; and

(5) Any further reliefs deemed fit and proper by this Honourable Court.

The Cause Papers

[4] The cause papers are:

(i) Divorce Petition dated 25.3.2021 [encl. 1] ("divorce petition");

(ii) The respondent's Answers to the divorce petition dated 13.6.2022 [encl. 12] ("Answers to Petition");

(iii) The petitioner's Reply to Answer to Petition dated 14.7.2022 [encl. 13] ("Petitioner's Reply");

(iv) The respondent's Answer to the Petitioner's Reply dated 2.8.2022 [encl. 14] ("Answer to Petitioner's Reply");

(v) The respondent's Notice of Application dated 25.11.2022 pursuant to Order 24 Rule 3 of the Rules of Court 2012.

[encl. 15] ("respondent's NOA");

(vi) Affidavit in Support affirmed by Chin Oi Khiun dated 25.11.2022 [encl. 16] ("respondent's AIS");

(vii) Affidavit in Reply affirmed by Ewe Khay Guan dated 20.1.2023 [encl. 18] ("petitioner's AIR");

(viii) Affidavit in Reply affirmed by Chin Oi Khiun dated 9.2.2023 [encl. 21] ("respondent's AIR");

(ix) Affidavit in Reply No. 2 affirmed by Ewe Khay Guan dated 27.2.2023.

[encl. 24] ("petitioner's AIR No. 2"); and

(x) Affidavit in Reply No. 2 affirmed by Chin Oi Khiun dated 14.3.2023 [encl. 26] ("respondent's AIR No. 2")

A **Background Facts**

[5] The court refers to the PH's statement of claim, the RW's statement of defence, and the facts of the case provided by the parties as follows for ease of reference:

B (i) the PH and RW were legally married on 23 September 1976 ("marriage");

(ii) since 29 July 2016, the PH and RW had been living separately arising from the petitioner's unilateral decision to exit the marriage;

C (iii) the parties had a property bearing an address at No. 1H, Lembah Taman Bukit, Taman Bukit, 14000 Bukit Mertajam, Pulau Pinang. This property was the matrimonial home of the parties prior to the filing of the divorce petition ("matrimonial home"); and

(iv) as is common in every divorce petition, both parties have different D versions and various reasons for the failure of their marriage. The matter in dispute to this petition is related to among others bank accounts, properties, assets, insurance and a company during the existence of the marriage.

Respondent's (RW) Submissions

E *Document In Existence*

[6] In the RW's NOA, the RW has particularised the documents which the respondent intends to be disclosed under her application. Briefly, the documents vary as follows:

F (a) the Petitioner's bank statements;

(b) proofs of ownership of the Petitioner's assets and/or property including the Petitioner's vehicles, insurance, and company named ENT Medic Excel Sdn Bhd ("ENT Medic"); and

(c) Petitioner's will; and travel records.

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[Collectively referred as "discovery documents"].

[7] On the present facts, the bank statements, salary slips, insurance policies, proofs of ownership of properties and assets would avail the court and the RW for a proper examination of the PH's authentic financial H capacity, which is:

(1) a material statement averred in the divorce petition in relation to the Petitioner's financial standing; and

(2) how the Petitioner is able to have control over the properties and assets during the Marriage and/or its breakdown.

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[8] To support her application, the RW refers to s. 3 of the Evidence Act 1950 which defines "document" as follows:

> ... any matter expressed, described, or howsoever represented, upon any substance, material, thing or article, including any matter embodied in a disc, tape, film, sound track or other device whatsoever, by means of:
>
> (a) Letters, figures, marks, symbols, signs or other forms of expression, description, or representation whatsoever ...

[9] The discovery documents sought by the RW, particularly the bank account statements, insurance policies, ownership of properties and assets (which would entail grants of the houses and cars belonging to the PH), the PH's will, the PH's travel records, are all records and documents which are well within the scope of s. 3 of the Evidence Act 1950 above would fall within the definition of "document".

[10] At this juncture, whilst it is apparent that the PH averred that he was empty-handed when he left the matrimonial home, the RW contests such averment. This is because, to the RW knowledge, the PH had always been equipped with monies in the form of various properties and/or assets.

The Discovery Documents Are Relevant And Necessary

[11] It is incumbent on the party applying to satisfy this court that the discovery is relevant and necessary to dispose a cause fairly. The principle above is decided in *Malaysia Debt Ventures Bhd v. Platinum Techsolve Sdn Bhd & Ors* [2020] 1 LNS 1252; [2020] MLJU 1421, the Court of Appeal held that "relevancy" arises when a particular document relates to the factual issues in disputes. The excerpt below applies:

> [173] Further, in regards to the critical question of "relevance" Edgar Joseph Jr said (at page 585 of the CLJ report):
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> > As to "relevance", our Rules of the High Court limit discovery to documents which are "relevant to" or "relate" to the factual issues in dispute. More particularly, the discovery obligation applies to documents "relating to matters in question in the action" [Rules of the High Court, O. 24, r. 1(1)] or "relating to any matter in question in the cause or matter" [O. 24, r. 3(1)]. In practice, relevance is primarily determined by reference to the pleadings but there need not be a pleading for a matter to be said to be in issue. (See *Phillips v. Phillips* [1879] 40 LT 815, 821. In this context, relevance is defined broadly. It does not extend to documents relevant merely to a party's credibility unless that itself is a fact in issue. (See *George Ballantine & Sons Ltd v. Dixon & Son Ltd* [1974] 1 WLR 1125). If, however, the document's relevance is to a fact in issue, not simply to credibility, it has long been settled that relevance of an indirect kind suffices.

[12] On such principle, the RW submits that the discovery documents are relevant to determine the issues in dispute before this court. The PH, in his divorce petition, alleged the following statements about the RW:

(i) the Petitioner asserted (with no shred of evidence whatsoever) that the Petitioner left the Matrimonial Home empty-handed without having any savings for his old age; [See: divorce petition, encl. 1, paragraph 20]

(ii) the Petitioner also asserted that the respondent had control over ENT Medic, including the respondent being the person to manage ENT Medic; and [See: divorce petition, encl. 1, paragraph 21]

(iii) in addition to managing the company, the respondent allegedly withdrew the monies from ENT Medic for her own use. [See: divorce petition, encl. 1, paragraph 23]

(iv) Under the same vein, the Petitioner had also acknowledged, if not admitted, that he is currently a specialist doctor and currently undergoing his medical practice in Hospital KPJ Bandar Perda at the filing of the divorce petition. [See: divorce petition, encl. 1, paragraph 3]

[13] Since the PH submits that the RW controlled the PH's properties and assets and that the PH could not benefit from such properties and assets, therefore, the discovery documents sought herein are immensely relevant in this dispute. The requirement for the necessity of a document is provided in O. 24 r. 8 of the Rules of Court 2012 whereby:

> 8. Discovery to be ordered only if necessary. (O. 24 r. 8)
>
> On the hearing of an application for an order under 3, 7 or 7A, the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.

[14] An application under O. 24 of the Rules of Court 2012 is also 'fact centric'. This means that the production of the documents sought would be based on the facts contained in cause papers in connection to the divorce petition, and also if such documents are necessary to begin with. The Court of Appeal in *Bandar Utama Development Sdn Bhd & Anor v. Bandar Utama 1 JMB* [2019] 10 CLJ 516; [2018] MLJU 697 affirms the principle above as follows:

> [18] It must be noted that Order 24 is 'fact centric'. Pure reliance of cases within and outside the jurisdiction as a general rule will not ntie the hands of the court in the exercise of its discretionary powers. The test whether or not to grant an order is set out in Order 24 rule 8 ...

[15] The RW submits that regardless of the veracity of the PH's averments, the PH is clearly the individual who would have in his possession, all the information and documents required by the RW. The PH's unjustified and unreasonable refusal to provide the RW with the requested discovery documents would adversely and materially impact the RW's case for there is a real possibility of the PH concealing his true financial capability. There are properties which are held in the RW's name upon being transferred from the PH's after the RW allegedly "pressured" the PH to do the same. The properties mentioned by the PH were meant for the PH's investments and the insurance policies which the PH had seemingly assigned the PH's rights to the RW (see: divorce petition, encl. 1, para. 17(i), paras. 24, 25, 32 and 37).

[16] RW submits that the requested discovery documents are, without a doubt, relevant and necessary documents which are intended by the RW to conduct proper examination and determination of the PH's authentic financial means.

The Discovery Documents Must Be Or Have Been In The Possession, Custody Or Power Of The PH

[17] The discovery documents sought by the RW contained the PH's ownership of such discovery documents. The bank accounts are held by the PH; therefore, the PH would be individual equipped with access and knowledge of such bank accounts. Similarly, documents relating to the PH's holding of the houses, cars, will, insurance policies and travel records would all be controlled by the PH or, within the PH's access, knowledge and/or safekeeping.

[18] The PH also had not denied that such discovery documents are within the PH's possession, custody, or power. The PH merely contests the relevancy of such discovery documents. Therefore, the RW submits that there is very little room to doubt that the PH would not have the discovery documents in his possession, including the absolute and unqualified power in obtaining the same.

Petitioner's (PH) Submissions

[19] The PH opposed to the RW's application. The PH contended four primary grounds of objection, namely:

(i) the discovery documents requested are not relevant to the issues contained in the divorce petition;

(ii) that the respondent is not claiming for any maintenance or share of the Petitioner's property;

(iii) the respondent did not deny that the Marriage had broken down; and

(iv) the discovery documents are merely a fishing expedition that are not relevant based on the pleadings filed.

A *The Discovery Documents Requested Are Not Relevant To The Issues Contained In The Divorce Petition*

[20] Looking at the prayers in encl. 15 holistically, the RW is simply trying to obtain, through the process of discovery, documents relating to the current financial position of the PH. This is clear from the documents that
B RW is seeking to discover. RW wants to have all the documents relating to finance and assets of the PH such as his bank statements, income slips, his declared income, particulars of share traded, records of the PH's movements in and out of the country, his insurance particulars, *etc*, all from 2016, (the year he left the matrimonial home), up to the present date. A common
C thread running through all the documents that the RW is seeking to discover *vide* encl. 15, is the period for which she is seeking discovery, *ie*, "from 2016 until present date."

[21] No reasons have been advanced by the RW in any of the affidavits filed in support of encl. 15, as to why the RW requires documents extending
D until the present day, especially since she is not seeking any maintenance from the PH. Hence, she need not know what the PH's income is now or his movements *etc*.

[22] In the affidavit in support (encl. 16), the reason advanced by the
E RW for discovery is that, the discovery is sought to rebut the PH's assertion in para 20 of encl. 1, "that the petitioner left the matrimony home empty-handed, without any money for his for his retirement". If that reason is true, then the discovery would only relate to documents for the month of June 2016, when he left the matrimonial home, and not documents from 2016 until present date. Hence, the application for discovery made by the RW is
F not for the purpose of rebutting the assertion in para. 20 of encl. 1, as alleged, but to know or obtain documents relating to his earnings, assets purchased and his movements since he left the matrimonial to the present date.

[23] Therefore, the said application is without any basis, not necessary for
G rebutting any allegation regarding the particulars of breakdown of marriage in encl. 1 which then makes it unnecessary for the fair disposal of the dispute between the parties and is made in bad faith. The PH submits that all the documents sought to be discovered by the RW are irrelevant and not necessary or, to borrow the words of Sir John Donalson MR, "not absolutely necessary "for the fair disposal of the petitioner's petition."

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[24] Under sub para. (2.1)(a) to (h) and para 2.3(a) of encl. 15, the RW is seeking to discover the bank statements of the PH's savings and current account in various banks and the statement of his fixed deposit in Standard Charted Account No 730-3-5663259-2 from 2016 until the present day.

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[25] This is an attempt by the RW to find out how much money the PH earned from the time he left the matrimonial home from 2016 until the present date. The money in the PH's account from 2016 until present date is irrelevant to the proceeding, taking into account the fact that the RW is not claiming any maintenance for herself from the PH.

The RW Did Not Deny That The Marriage Had Broken Down

[26] The PH has given the particulars of breakdown of marriage in para. 17(i) to (ix) in encl. 1, and the particulars contained therein are what the PH will have to prove in court, in order to establish that the marriage between the PH and the RW has irretrievably broken down. The PH's petition stands or falls on the facts asserted in para. 17(i) to (ix) of encl. 1. The particulars alluded to in para. 17 of encl. 1 does not extend to any allegation so far as to say that the marriage has broken down due to the PH having lack of funds.

[27] As submitted above, the RW has stated in the grounds of her application for discovery, that the discovery is sought to rebut the PH's assertion in para. 20 of encl. 1 that he left the matrimony home empty handed, without any money for his retirement. Asking for the particulars of monies until the present date far exceeds the basis for which the RW is seeking discovery, which only relates to, if at all, the bank balance as at June 2016 and not from 2016 till the present date.

[28] The PH submits that the discovery of the bank statement the RW is trying to make under sub-paras. (2.1)(a) to (h) and (2.3) of encl. 15 is irrelevant and far exceeds the scope of the RW's defence and ought not to be allowed as it does not satisfy the requirement of it being "necessary for disposing fairly of the proceedings". Despite the PH's submission that discovery sought by the RW under sub-paras. (2.1)(a) to (h) and (2.3) of encl. 15 ought not to be allowed, as in para. 12.5 above, to make it easier for the court to decide on this matter, the PH is hereby putting on record, that the PH will abandon the assertion in para. 20 of encl. 1 and therefore, with this concession, it will no longer be necessary for the RW to seek discovery with a view to rebut the assertion contained in para. 20 of encl. 1 and with that, the grounds on which the RW is seeking discovery is no longer valid.

[29] Under sub-para. (2.2)(a) to (h) of encl. 15, the RW is seeking to discover the PH's credit card statement from 2016 to the present day. The RW's application to discover the credit card statements of the PH from 2016 to the present day is clearly an attempt to find out the PH is pending habits and his spending after he left the matrimonial home until now. The pattern of the PH's spending and the monies spent by him from 2016 to the present day, is irrelevant to the issue arising for determination in this proceeding, which is, whether the marriage between the PH and the RW has irretrievably broken down, which led the PH to leave the matrimony home in 2016.

[30] Further to the above, the RW have not alluded to any fact in her pleadings regarding the PH's spending after he left the matrimony, which gives rise or contributed to the breakdown or otherwise of their marriage, to justify the application to discover the PH's credit card statement from 2016 to the present time. Credit card spending is spending the money of the bank. It creates liability. The liability created by the PH for himself by using his credit card and the spending habits of the PH from 2016 to the present time is irrelevant for the fair and just disposal of the dispute between the parties herein, especially since there is no cross-petition filed by the RW seeking any maintenance for herself. Therefore, this is clearly a fishing expedition by the RW.

That The RW Is Not Claiming For Any Maintenance Or Share Of The Petitioner's Property

[31] The RW did not give any reason in the affidavits affirmed and filed by the RW in support of encl. 15, as to how and why the credit card statements are relevant and necessary for the fair disposal of the dispute between the parties. Under sub-para 2.4 of encl. 15, the RW's seeking to discover the stock trading account of the petitioner's CDS account in UOB Kay Hian Securities and AA Anthony Securities from 2016 till the present day.

[32] The RW is not seeking any part of the shares in the PH's UOB Kay Hian Securities and AA Anthony Securities. No mention of any shares held by the petitioner is made in the pleading or in the affidavits in support of encl. 15. In this case, the shares traded by the PH from the time he left the matrimony home to the present date is therefore irrelevant to the divorce proceeding.

[33] *Vide* sub-para 2.5 of encl. 15, the RW is seeking to discover the CIMB Bank statement of the loan account for property known as No. 18, Lorong Lobak 5, Taman Serumpun, Berapit, 14000, Bukit Mertajam. The loan account from CIMB is a liability that the PH is saddled with and not an asset. The loan amount of the repayment of is not relevant for the purpose of this proceedings, the RW is not staking a claim for a share for the said house in this proceeding.

[34] *Vide* sub-para. 2.6(a) to (e) of encl. 15, the RW is seeking to discover the financial statements of the PH's EPF No 5595649, his ASB statement, his IRB (LHDN) tax statements, his standard deposit/consultant doctor retention fee paid to his employer, KPJ Bandar Perda Hospital, his salary slip and director's fees received as a director of KPJ Hospital and the PH's complete employment agreements with the KPJ Bandar Perda Hospital all from 2016 until the present date. All the statements that the RW is seeking to discover is irrelevant for the purpose of this proceedings. The RW is not seeking any maintenance for herself and therefore, the PH's earnings from

2016 to the present date is irrelevant to this proceeding. It is different if the RW is seeking maintenance for herself, which she is not. Therefore, his income, declared tax from his earnings from 2016 to the present date, his EPF statement, his director's fees received, the deposit paid to KPJ Bandar Perda hospital and his employment agreement are all irrelevant for the fair and proper disposal of this proceedings. Since the RW is not seeking maintenance for herself, the discovery sought by her under sub-para 2.6(a) to (e) of encl. 15 will all be irrelevant.

[35] In *Yap Yen Piow v. Hee Wee Eng* [2016] 1 LNS 1060; [2017] 1 MLJ 17, the Court of Appeal in dealing with the division of matrimonial property, introduced the nexus test in determining what are matrimonial properties that can be subject to a claim in matrimony proceedings, held that if there is no enjoyment and/or use for the current common purpose of any property that can be considered a matrimony property, then the nexus test is not satisfied and the claim must fail. In this regard, the Court of Appeal held that EPF, insurance, pension *etc* may not satisfy the nexus and therefore may not constitute matrimony properties.

[36] In *Vikkaram Subramaniam v. Yogeswery Sarkgunalingam* [2018] 1 LNS 39, the court held that EPF contribution is not matrimonial property. The PH's salary, his declaration of tax and his employment contract, his directors fees received, EPF statement, *etc* are neither relevant, nor matrimonial properties, and therefore, the application for discovery of those document should be dismissed.

[37] *Vide* sub-para 2.7(a) to (d) of encl. 15, the RW is seeking proof of ownership of assets and/or property of grant and/or property title for No. 18, Lorong Lobak 5,Taman Serumpun, Berapit, 14000 Bukit Mertajam di bawah GRN 122232 Lot 377 Seksyen 3, Seberang Perai Tengah, Bandar Bukit Mertajam Pulau Pinang, grant and/or property title at 9A-20-13A, Taman Kheng Tian, Jalan Van Praagh, 11600 Georgetown, Pulau Pinang di bawah GRN 825313, No. Lot 2922 Seksyen 2, Daerah Timor Laut, Bandar Jelutong (both properties hereinafter referred as "the properties"), the rental agreement executed by the PH and the rental income for the properties. The RW is not seeking any maintenance for herself or any shares in both the properties and therefore, the rental agreements (if any) are not relevant for the fair and proper disposal of this proceeding. As such, the RW's attempt to discover the documents related to para. 17 is only a fishing expedition with the purpose of having knowledge on the properties and income from the properties till date, not until 2016 when the PH left the matrimonial home.

[38] *Vide* sub-para 2.8 of encl. 15, the RW is seeking to discover the valuation report of the PH's shares in the PH company's (ENT Medic Excel Sdn Bhd) (Registration No.: 201001020529 (904299-H)) ("company") records showing that the RW worked in the said company, especially the payment and contributions made to the RW by the said company.

[39] The PH submits that the discovery of the documents has no basis nor proper reasoning provided by the RW, especially on how will the documents sought for discovery in sub-para 2.8 of encl.. 15 will be of use for the proper and fair disposal of this proceedings. This is because the RW has full control over the company and the monies in the company.

[40] *Vide* sub-para 2.9 of encl. 15, the RW sought for discovery for the ownership records for BMW car with Plate No. PKU 6652, Subaru Plate No. BNV 6101, Lexus with Plate No. PQE 1979 and Honda with Plate No. PLH 9989. The RW has not raised any issue relating to the ownership of the four vehicles mentioned above, neither is she seeking ay shares in those cars and therefore, the discovery sought herein are irrelevant and unnecessary for the disposal of this proceeding.

[41] *Vide* sub-para 2.10 of encl. 15, the RW was seeking for the insurance policies owned by the PH or wherein the PH was a beneficiary of such policy. The PH submits that it is pleaded in the petition that the RW is the absolute assignee of the insurance policies and therefore, the PH could not possibly have any knowledge relating to the said policies. It will be within the knowledge of the RW. As the absolute assignee, the RW can directly contact the insurance companies in the event the RW needs to seek for the policies. Even so, the RW is not seeking maintenance or shares in whatever policies that she is seeking and therefore, the discovery of the insurance policies are irrelevant.

[42] *Vide* sub-para 2.11 of encl. 15, the RW is seeking discovery of any will that has been executed by the petitioner. The PH has stated in his affidavit that he has not executed any will till date. However, the PH submits that he has a right to bequeath any properties belonging to him to any person that he wishes to give. It is his right and is not subject to litigation in this petition.

The Discovery Documents Are Merely A Fishing Expedition That Are Not Relevant Based On The Pleadings Filed

[43] *Vide* sub-para 2.12 of encl. 15, the RW also seeks for the PH's travelling records from 2016 till present date. The PH's travelling records from 2016 till present date is irrelevant. What he does after he left the matrimonial home is not subject to this proceeding. Therefore, the discovery of his travelling documents are totally irrelevant and unnecessary.

[44] Looking at encl. 15 in totality, the discovery sought is not only unfair, oppressive and incapable of compliance, it is also a fishing expedition to know the status of the PH from the time he left the matrimonial home till now and in this regards, the PH refers to the case of *Nguang Chan Aka Nguang Chan Liquor Trader & Ors v. Hai-O Enterprise Bhd & Ors* [2009] 5 MLJ 40, where the Court of Appeal in not allowing discovery, observed as follows:

If necessity is not the prime concern of the court, allowing discovery would tantamount to allowing the respondents to fish for evidence which defeats the purpose of the rule by causing the appellants to suffer unfair disadvantage if they fail to comply with an order which is oppressive and incapable of compliance.

[45] The RW absolutely failed to show that the discovery documents are relevant for this court's determination, be it the divorce petition or the RW's affidavits in reply. This is because the RW did not indicate on any maintenance whatsoever within her application; The issues of maintenance and the division, shares and/or portion of the PH's properties were not in contention. The RW had never denied the marriage had broken down. Rather, the reasons and details for the breakdown of the marriage are argued.

[46] This is a fishing expedition. What is a "fishing expedition"? In *Billion Prima Sdn Bhd & Anor v. Nutech Company Ltd & Anor* [2017] 1 CLJ 179, Wong Kian Kheong JC (as he then was) referred to *Thyssen Hunneback Singapore Pte Ltd v. TTJ Civil Engineering Pte Ltd P* [2003] 1 SLR 75 to illustrate what amounts to a fishing expedition, whereby:

(c) an applicant has the legal burden to fulfil the relevancy requirement. Once the relevancy requirement is satisfied, I do not think the discovery application against third party is frivolous, vexatious, speculative or a fishing expedition. I refer to Choo Han Teck JC's (as he then was) judgment in the High Court case of *Thyssen Hunneback Singapore Pte Ltd v. TTJ Civil Engineering Pte Ltd* [2003] 1 SLR 75, at paras. 5 and 6, as follows:

5 ... I accept that in some cases the line between a reasonable possibility of finding such information and a fishing expedition is a fine one. Hence, a case must be considered on its own merits. It will be borne in mind that should it subsequently transpire that no relevant information was in fact found in the documents disclosed, that does not, in itself, mean that the request was a fishing expedition – a term that used to serve well, but has recently been showing signs of abuse. It must be remembered that the right and entitlement of the party concerned is to know and inspect the documents in the hands of the other. The relevancy of the connection of the documents to the claim is a broader form of relevancy than the relevancy of documents for the purposes of admitting them into evidence at trial. If that is thought to be a "fishing expedition", then it is time to examine more closely what that term means. 6 In my view, I would hold that a "fishing expedition" in the context of discovery refers to the aimless trawling of an unlimited sea. Where, on the other hand, the party concerned knows a specific and identifiable spot into which he wishes to drop a line (or two), I would not regard that as a "fishing expedition". But I would myself prefer to approach such applications strictly on the basis of the broader relevancy test. 52.

A **Analysis And Findings Of The Court**

[47] There is no doubt that the court is given discretionary power to hear and decide this application under the ROC 2012. In *Nguang Chan Aka Nguang Chan Liquor Trader & Ors v. Hai-O Enterprise Bhd & Ors* [2009] 5 MLJ 40, the Court of Appeal held that:

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> Under O. 24 r. 13(1) of the Rules of High Court, an order for the production of documents for inspection is not to be made unless the court is of opinion that such order is necessary either for disposing fairly of the case or matter or for saving costs. It is for the party seeking production to satisfy the court that such production is necessary for the purpose
C specified in r. 13(1). The court would dismiss a plaintiff's application for discovery if the plaintiff is merely fishing for evidence to prop up his case and to allow him discovery would be unduly oppressive to the party giving discovery" (at p. 47).

[48] In *Yekambaran Marimuthu v. Malayawata Steel Berhad* [1994] 2 CLJ 581,
D the court held that:

> The essential elements for an order for discovery are threefold, namely first, there must be a "document", secondly, the document must be "relevant" and thirdly, the document must be or have been in the "possession, custody or power" of the person against whom the order for
E discovery is sought. It is indisputable that the items sought were documents and were in the possession, custody or power of the defendant.

[49] Based on the reasons, this court finds that the documents are relevant to determining the PH's matrimonial assets, income, and how they were
F obtained. This is not a "fishing expedition."

[50] This court would like to refer to the case of *Datuk Amar James Wong Kim Min & Anor v. Pendaftar Pertubuhan* [2004] 1 LNS 2011; [2004] 6 MLJ 235, the court held at p. 239 that:

> To me, the applicants must be specific to the documents they are
G requesting for disclosure, otherwise, their application will turn out to be mere fishing expedition. This Court, is not going to issue the applications ...

[51] In *Kuah Kok Kim & Ors v. Ernst & Young (A Firm)* [1997] 1 SLR 169, the Court of Appeal in Singapore held that:

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> As long as the appellants described the type or class of documents with reasonable precision, and that class of documents were relevant to the cause of intended cause of action that would be enough. They need not go on to describe and name each and every such document specifically. Indeed, it would be unreasonable and impossible for the appellants to do
I so.

In that case the court decided that, the plaintiff's attempt to seek for a wide range of documents would render their application to be a fishing expedition.

[52] In our case, all the relevant documents are specified by the RW in their enclosure. Differently in our case now, all the requested documents are stated clearly and not in a general way that confuses the PH to supply them. In this case, the PH does not deny the existence of the document or deny it is in his possession, this shows that the requested document exists and is under the PH's control.

[53] Therefore, a "fishing expedition" in this sense would refer to documents which are not specific and identified. This is not the case in the RW's application. The RW had successfully identified which discovery documents that RW is seeking from the PH. It is clear that, the bank accounts are specific as to the bank account numbers; their bank source and the date of statements; the proofs of ownership of the PH's properties and assets (*eg*, vehicles, houses, and insurance policies) have been identified down to the vehicle numbers, house addresses and the specific insurance policy numbers; and the PH's will and travel records have been identified on their specific timeline of such will and travel records.

[54] Throughout our case, the PH makes no claim in his affidavits that the documents in question are injurious or prejudiced to them if they were given to the RW. In *Faber Merlin Malaysia Bhd v. Ban Guan Sdn Bhd* [1980] 1 LNS 189; [1981] 1 MLJ 105, held that:

> If it be the case that discovery is tied to the question whether it is relevant to any issue or question raised on the pleadings, then the court may order the determination of that issue or question before deciding on the extent of the order for discovery ... But where the issue or question is clearly raised in the cause or matter, then equally clearly the order for discovery must be determined by the consideration whether it is necessary at the stage of the application ...

[55] The PH's refusal to grant the RW the documents requested was based on grounds that were not relevant. Given that the copies of the documents sought concerned only the RW, were directly relevant to this case, and were undeniably in the PH's possession, custody, or power. Therefore, there are no good reasons for the PH to refuse to give all the relevant documents in the first place. All the requested documents are documents that have actually been referred to by both parties in their respective pleadings, so it is relevant because it is not the document that is cited for its existence in the application alone, but rather from the start of the filing of their respective pleadings. So, the documents are actually relevant not only to the RW's case but also to the PH to refer to during the trial.

[56] The RW submits that the PH has a duty to disclose all the relevant documents for this trial. The RW argues that the documents are within the PH's control. The existence and control of the document is not denied by PH. The order given by the court is for the PH to disclose the document by way of an affidavit. If the PH cannot produce the documents listed, the PH has a right to state in the affidavit all the reasons why the documents cannot be produced (if any) for the inspection.

[57] Based on the affidavit filed, this court finds that the PH has a duty to disclose the relevant documents as listed in the application. Since the divorce petition involves a claim on "during the marriage", of course documents related to the capacity of both parties are required. The use of credit cards, bank statements, for example, will certainly be able to assess the PH's financial ability in assessing the ability to contribute to marital property. The ownership document of immovable property will of course be able to determine who the owner is and how it was acquired and whether it was acquired in a marriage that makes it matrimonial property.

[58] For the will document (if any) can determine whether the PH has made a will to his heirs which may also include the disputed property. The PH claimed that he was forced to transfer ownership of immovable property to the RW. This transfer of ownership certainly involves related documents and is relevant to submit.

[59] In relation to the income tax document, it is relevant because this will determine the amount of the PH's income because there are claims related to the spouse's ability to contribute or own the disputed marital property. This will not "harm" the PH because this is an important supporting document for the case of both parties.

[60] The argument that income related documents, credit cards and bank statements are irrelevant because the RW is not claiming maintenance in this case is inaccurate. This is because the document is not only for maintenance purposes but also for divorce petitions where the financial capacity of the parties becomes an issue. Based on the financial capacity, it can be assessed whether the RW or the PH is in a comfortable financial position to claim that the properties mentioned were purchased or also involve financial contributions from both of them.

[61] Documents related to LHDN (IRB) and also all payments received since 2016 are relevant in this case. Based on the document, the court will be able to review PH's financial ability to own the property that is claimed to have been purchased in the spouse's name during the marriage and has been transferred to the RW.

[62] Since this dispute involves documents, it is imperative that relevant documents be produced. Since, in this case, the requested document is in PH's possession, it should be given. In the same manner as previously stated,

this application was made by the RW in the belief that the documents are in the PH's possession and for the PH to present them in the form of an affidavit. So, this does not prevent the PH from also stating in the affidavit if the document is not in the PH's possession.

[63] The requested documents are related to both pleadings and relevant to the claims. The application by the RW has merits as it fulfilled the requirements under O. 24 of the ROC 2012. The documents referred to are stated in the affidavits and pleadings. The application for discovery of documents under O. 24 r. 10 of the ROC 2012 is applied to documents referred to in the affidavit and pleadings. If the application was made to support a witness statement, not to support an affidavit or the PH's pleadings, it can be said it amounts to a fishing expedition.

[64] This court is satisfied that based on the facts of the case and also the pleadings of the divorce petition, the bank statements, salary slips, insurance policies, proofs of ownership of properties and assets would avail the court and the RW for a proper examination of the PH's financial capacity, which is:

(i) a material statement averred in the divorce petition in relation to the PH's financial standing;

(ii) how the PH is able to have control over the properties and assets during the marriage and/or its breakdown; and.

(iii) whether the transfer of ownership of immovable properties in the event that it exists and involves the matrimonial properties.

[65] The court also ruled that the documents are not only relevant but also necessary and saves the parties' costs. This guidance has been decided in the case of *Malaysia Debt Ventures Berhad v. Platinum Techsolve Sdn Bhd & Ors* [2020] 1 LNS 1252; [2020] MLJU 1421, where S Nantha Balan JCA delivering judgment of the court examined numerous cases on the subject and concluded that:

> [198] *Further, it is also imperative for the respondents to establish that the DSA is necessary. Relevance cannot be conflated with necessary, as what is relevant may not be necessary*.
>
> [199] In our view, the question as to whether the document for which disclosure is sought is necessary is an important and we might, add pivotal component for the order of discovery under Order 24 Rule 7 ROC. Indeed, Order 24 Rule 8 ROC also makes it imperative that the Court to refuse discovery if it is satisfied that discovery was not necessary.
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> [202] In our view, the proper approach to the question of whether discovery is "necessary" may be gleaned from the case of *Bayerische Hypo-und Vereinsbank AG v. Asia Pacific Breweries (Singapore) Pte Ltd and other applications* [2004] SGHC 155; [2004] 4 SLR (R) 39 ("*Bayerische*") where the High Court of Singapore at paragraph [37] stated as follows:

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> *The ultimate test is whether discovery is necessary for disposing fairly of the proceedings or for saving costs. An assertion that the documents are relevant will not be good enough. Equally, an assertion that the documents are necessary because they are relevant will not be enough.*
>
> (emphasis added)

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[66] It is also a factor for the court's consideration that it will reduce the costs of the parties. It is the court's discretion to allow this application as stated under O. 24 r. 13 of the ROC 2012 for the production and inspection of any documents as follows:

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> Production to be ordered only if necessary (O. 24 r. 13)
>
> (1) An order for the production of any documents for inspection or to the Court shall not be made under any of the foregoing rules unless the Court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.

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[67] The Federal Court recently clarified and emphasised the test in order to determine whether the documents in question are required for a fair disposition of the matter or for cost savings in *Protasco Bhd v. Tey Por Yee & Anor And Other Appeals* [2021] 9 CLJ 349; [2021] 6 MLJ 1, held that:

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> [22] *There is a specific legal framework for discovery in Malaysia, specifically O. 24 ROC. Prior to the coming into force of the ROC, the Rules of the High Court 1980 ("RHC") similarly provided for discovery (though non-party discovery was dealt with through the application of common law principles). It is in this context that consideration should be given to the existence of a specific legal framework for discovery in Malaysia, previously under the RHC, and now, the ROC.* The ROC is an exhaustive code providing no room for the exercise of any common law principles of discovery. It was submitted that this carries with the following legal implications. If a party is seeking discovery against a bank as a non-party, that party must apply for discovery under O. 24 r. 7A(2) ROC. If this is prior to the commencement of action, then the application is moved under O. 24 r. 7A(1) ROC.
>
> ...
>
> [33] *Order of discovery will only be granted if the court is satisfied that discovery is necessary for disposing fairly of the cause or matter or for saving costs.* Order 24 r. 8 of the ROC 2012 provides that if the court is satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, it may dismiss or adjourn the application and refuse to make such an order if in its opinion that discovery is not necessary."
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> (emphasis added)

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[68] The court also found that it was not even possible that the documents that were intended to be obtained (which were stated in details) would affect or result in confidentiality that threatens the security or privilege as explained in the case of *Protasco Bhd* (*supra*):

> *Discovery is thus a precursor to inspection; inspection is not a discovery exercise. A party who applies for discovery must provide a proper list of the discoverable and non-discoverable documents. Discoverable documents refer to documents, which do not contain any confidential information or privileged information available for production and inspection (See: Schedule 1, Part 2 of the List of Documents; Form 38 of the ROC 2012).* (emphasis added)

Conclusion

[69] The court found that RW has met the conditions set on the balance of probabilities in the well-established principles that have guided this court for this application to be allowed.

[70] For the reasons stated above, this court decided for the interests of justice, that the RW's application for discovery in encl. 15 is allowed with no order as to costs.